

Australian Public Law

Contents Page

TOPIC	P
1. Australia's Constitutional History	
2. Washminster System: Federalism/Representative/Responsible Government	
3. Key Constitutional Themes & Constitutional Conventions	
4. The Legislature I: Constitutional Disputes concerning Structure & Election of the Commonwealth Parliament	
5. The Legislature II: Legislative Power & State Constitutions	
6. The Legislature III: Limitations on Legislative Power: Delegation & Abdication	
7. The Courts & Parliament: Judicial Intervention in Legislative & Parliamentary Proceedings	
8. Executive Power	
9. The Executive II: Prerogative & Nationhood	
10. Executive Power II: The Executive Power to Contract & Spend	
11. The Nature & Separation of Judicial Power	
12. Judicial Adjustment of the Separation of Powers doctrine and its Application at State Level	

1. AUSTRALIAN CONSTITUTIONAL HISTORY

Constitutionalism

- Idea... that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations. – Waluchow
- Law places limitations on governmental power and how it can be exercised

Indigenous legal histories

- At least 40,000 years of history
- Many nations, languages, and systems of law and rules
- Prior to European settlement – ways of regulating behavior
- Captain Cook laid claim to the eastern seaboard in 1770, upon the arrival of the First Fleet in 1788
- Creation of a new legal regime

What non-indigenous laws applied to New South Wales at the moment of colonisation?

- Under British law at the time, there was an answer to this question.
- The answer depended on whether New South Wales was an uninhabited country that had been 'settled' or an inhabited country that had been 'conquered/ceded'.

Mabo v Queensland (No 2) (1992)

Brennan J recounted some of the findings of fact of Morynihan J of the Supreme Court of Queensland about the Meriam people:

- Communal life based on group membership seems to have been the predominant feature of life.
- Social activities which took place in the context of group activities of a ceremonial or ritualistic nature.
- Behaviour was regulated in the interest of the community by social pressures. ..
- Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.

Constitutional histories But with respect to criminal law (& sovereignty?), Walker v NSW(1994). question which arose was whether customary Aboriginal criminal law is something which has been recognised by the common law and which continues to this day

These submissions were rejected: It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle....English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.'

- No universal adult suffrage for indigenous Australians until 1962
- No indigenous Australians could be counted in the census before 1967
- Ongoing campaign for constitutional recognition...

Constitutional history

For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.... But in conquered or ceded countries, that have already laws of their own, the [conquering] king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain...Blackstone, 1765 & 1773

Australia was regarded as an uninhabited territory settled by the British, rather than a 'conquered/ceded' colony. 'The indigenous people of a settled colony were...taken to be without laws, without a sovereign and primitive in their social organization' Brennan J, *Mabo* (No 2) at 36.

The consequences of regarding Australia as uninhabited or 'terra nullius': In a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally. Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England as though New South Wales were "an uninhabited country ... discovered and planted by English subjects"...Brennan J, *Mabo* (No 2) at pp 37-38.

- Uncertainty marked the first decades of NSW's legal system.
- Using his executive power, the Governor created and executed laws pursuant to his charter, consistent with British law, and backed by the UK Crown and Parliament.
- Gradual change from military dictatorship' (Joseph & Castan) to representative and responsible government.
- Aus – PM has to be member of parliament but not in US (Pres cannot be part of Congress)

British legal history

- English and British constitutional history developed at a rapid pace in the 1600s and 1700s.
- Australian public law inherits much from English/British public law

New South Wales Act 1823 (Imp)

- Establishes a Legislative Council with 5-7 members appointed by the (British) Secretary of State.
- Governor required to lay legislative proposals before the Council - Council could not veto but could discourage.
- No proposal could become law without the NSW CJ certifying it was consistent with 'the laws of England'
- All laws to be sent to London for possible veto and for laying before the Westminster Parliament.

Constitutional History

- *Australian Courts Act 1828* (Imp)
- Triggered by a 5 year sunset clause in the NSW Act 1823
- Confirmed that common law precedents & principles had been 'received' at settlement, and set a date at which statute law was 'received' in NSW & Tasmania (25 July 1828).
- Vic & Qld inherit this date too. SA & WA get later dates.
- Later Acts to apply only if passed specifically for the colonies
- NSW and Tas Legislative Councils and Courts strengthened

We now see two related stories develop

- Colonial legislatures increasingly become home to (somewhat) responsible & (somewhat) representative government.
- Colonial legislatures sometimes pass laws that colonial judges regard as inconsistent with English law.
- In 1842, the NSW Constitution Act (Imp) introduces a 2/3-elected Legislative Council based on a limited franchise.
- A move towards representative government.
- Governor & Executive enabled to make laws with the advice and consent of this Legislative Council
- But we don't yet have responsible government: Executive not members of Council and Governor/Crown had overriding authority

Constitutional history

- In 1850, the Australian Constitutions Act (Imp) liberalises the franchise and empowers the Governor & Legislative Council to establish a bicameral Parliament either appointed or elected.
- This becomes a reality with the NSW Constitution Act 1855 (Imp).
- Limited-franchise representative government and responsible government become part of Australian colonial constitutional life.
- Other colonies follow: Tas and Vic in 1855, SA in 1856, Qld in 1859 & 1867, WA in 1890.

What do these colonial parliaments look like?

- Example: the Victorian Constitution Act 1855
- The upper house (the Legislative Council) (ss2-5)
- 30 members from 6 'provinces'
- Members to be 30+ men, natural-born Subject, high property requirement to be a member
- To vote, 21+ men, medium-high property requirement or University graduate/lawyer/doctor/religious minister/military officers etc.

Constitutional history

- The lower house (the Legislative Assembly) (ss10-12)
- 60 members from 37 electoral districts
- Members to be 21+ men, natural-born Subject or naturalized for >5 years, medium-low property requirement [£2000/£200]
- To vote, 21+ men, low property requirement [£500/£5]
- NB detailed provisions about land ownership etc.
- The beginnings of responsible government (s18): 'Of the following Officers of the Government...Four at least shall be Members of the Council or Assembly

Constitutional history

- Colonial legislatures sometimes pass laws that colonial judges regard as inconsistent with English law.
- What to do?

Constitutional history

- South Australian: Judge Benjamin Boothby enthusiastically invalidates colonial legislation in the 1850s and 60s.
- 2 laws contradict each other – cover similar topic
- 1850s and 60s Judge Boothby invalidates colonial legislation – exceeding powers, because the Governor had not reserved the legislation for Royal Assent and sometimes because of inconsistency with English law
- We get the *Colonial Laws Validity Act 1865* (Imp)

Constitutional history

- What do you make of the repugnancy doctrine?
- This doctrine remains in effect for the States 'til 1986)

Colonial Law when void for Repugnancy. 2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial Law when not void for Repugnancy. 3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

Colonial Laws Validity Act 1865 (Imp)

- Colonial law is only invalid if it is repugnant with Westminster Law (pass an act specifically for the colony)
- Colonies can do what they like from now on
- Greater autonomy for colonial legislatures – responsible and representative go
- Reduced but ongoing legal links to the UK and to the Imperial parliament – overriding power
- Link to increasingly responsible and representative governments

So, to recap, over the late 1700s and 1800s

- Rise of self-government and colonial parliamentary power
- Rise of (somewhat) representative government and (somewhat) responsible government
- Rise of colonial judicial power
- Decline in governors' power

Constitutional histories - What haven't we seen yet that we might expect to see in a constitution?

- Universal franchise
- Key human rights; equality e.g no freedom of speech
- National independence - Imperial parliament can tell what the law should be
- Separation of powers – united not separation
- Federalism but London and colonial – similar

Sir Henry Parkes Tenterfield Oration, 24 October 1889

- Australia has now a population of three and a half millions, and the American people numbered only between three and four millions when they formed the great Commonwealth of the United States.
- It is essential to preserve the security and integrity of these colonies, then the whole of our forces should be amalgamated into one great Federal army.
- If [Qld, NSW, Vic, SA] could only combine to adopt a uniform [railway] gauge, it would be an immense advantage in the movement of troops. These are two great national questions which I wish to lay before you... one great federal army and a nation wide uniform gauge railway line.

Constitutional histories federation and beyond

Australian people shall be one, henceforth and forever... We seek no separation. We only seek to draw closer the bonds of true loyalty, and to

continue to share in the rights and privileges that belong to every British subject... Our cause is well known. Our cause is peace. Our cause is the consolidation of Australian interests... One people. One destiny. Sir Henry Parkes National Australasian Convention, Sydney, 1891

The federal system has been created to unite the various advantages that result from the large and the small sizes of nations... You cannot imagine to what degree this division of sovereignty serves the well-being of each of the states that compose the Union. In these small societies, not preoccupied by the need to defend themselves or to expand, all public power and all individual energy are turned toward internal improvements... The Union is free and happy like a small nation, glorious and strong like a large one.-- Alexis de Tocqueville, *Democracy in America* (vol 1), 1835.

Constitutional history

- 6 existing entities came together to unite but not losing their identities
- Federalism is about combining benefits of small countries with that of larger countries. Different to nationalism.

Why a federal Australia?

- A new national parliament and government capable of dealing with defence, common enemies, regional affairs, etc.
- National government: A national economic union to eliminate internal tariffs and barriers and standardise external ones – tax
- Maintenance of British constitutional and political heritage.
- Links to the UK and traditional Westminster systems
- Maintenance of some autonomy for the existing colonies

Models/influences for the new federal constitution

- Canada – but concerns over central government. More power to national government than to local. Aus did opposite.
- Switzerland – referenda, federalism.
- The UK – responsible government, representative government.
- The United States – federalism, division of powers, institutions, language & structure, Civil War.
- No Bill of Rights. Trust Parliament to act responsibly and uphold rights

Process for federation:

- Federal Council of Australasia (1885)
- Through the 1890s, a series of conventions and meetings with varying membership and attendance.
- Sydney 1891; Adelaide '97; Sydney '97; Melbourne '98
- Put to colonial referenda over 1899-1900.

Section 125. Seat of Government

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney. Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor. The Parliament shall sit at Melbourne until it meet at the seat of Government.

Process for federation

- British Parliament passes Commonwealth of Australia Constitution Act 1900 (Imp)
- Constitution in s9 of the Imperial Act
- Imperial Act one of 'paramount force' for the purposes of the CLVA
- This is legislation passed in London

So what did this Constitution provide for? What powers did the new government have?

- Summarised by Castles in B&W:

Following the enactment of the [CLVA] the status of English law in Australia could be defined with reasonable clarity. On the one hand, subject to their own constitutions and the [CLVA], the Australian states could repeal or amend the British statutes and unenacted English law which had been received under the common law constitutional principles.

- On the other hand, the States were still bound by British statutes... which applied to them by paramount force.
- Initially, there is some uncertainty over whether the CLVA's repugnancy doctrine applies to the Commonwealth.
- After all, the CLVA was enacted almost 40 years before the Commonwealth Constitution.

Was the Commonwealth just another Colony?

- In 1925, the High Court held that the CLVA's repugnancy doctrine did apply
- So this meant that the Commonwealth was in a similar position to the States
- Where there were UK laws on the books that extended to Australia, the new Commonwealth Parliament couldn't legislate to repeal/amend those UK laws.
- See eg *Union Steamship Co of NZ v Cth* (1925)

Constitutional histories Greater clarity comes with the Statute of Westminster 1931 (UK) for all the 'Dominions':

- Section 2 repeals the operation of the CLVA for the Commonwealth ...but not for the States
- Section 3 declares Commonwealth's power to make laws with extraterritorial application
- In future, Cth legislation cannot be invalidated on the basis of repugnancy with UK paramount force legislation or for reasons of extraterritorial reach
- Does not mean existing UK paramount force laws no longer apply in Australia in the meantime
- Statute Westminster: Commonwealth can pass laws without worrying about inconsistency with Imperial parliament – increasing autonomy
- But not states – extraterritorial legislation e.g shipping

For some Dominions (eg Canada, Irish Free State) the Statute of Westminster comes into effect right away. We in the Commonwealth of Australia don't adopt the Statute of Westminster until 1942, with retrospective effect to 3 September 1939: Statute of Westminster Adoption Act 1942 (Cth).

- Late 1941 Pearl and 1942 bombing in Darwin – direct threat of attack or invasion on Australian soil. Greater autonomy for Commonwealth but states are still limited on what they can pass.

Moves towards greater independence continue post-World War 2:

- Appeals from federal and territory courts to the Privy Council were limited in 1968
- Privy Council (Limitation of Appeals) Act 1968 (Cth)
- And prospectively abolished from the High Court in 1975
- Privy Council (Appeals from the High Court) Act 1975 (Cth)
- But appeals available directly from State Supreme Courts
- Move towards an independent Aus
- As late as 1970s state laws could still be found inconsistent with Imperial legislation – mainly shipping law etc
- Does not look like an independent country – UK parliament could still pass laws over the top of Australia

High Court of Australia Privy Council State Supreme Courts

And there was at least one other problem

- As late as 1979, the High Court found that 20th Century South Australian legislation was inconsistent with an 1894 UK law via the old CLVA formula.
- *China Ocean Shipping v South Australia* (1979) 145 CLR 172

In response to problems like these...

The Australia Acts 1986 complete legal independence

"An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation"

- Versions of the legislation adopted by States, Cth, UK
- Ends application of future UK laws to Cth & states (s1)

- Removed doctrines of repugnancy and extraterritoriality for the states (s2, s3)
- Abolished state court appeals to Privy Council (s 11)
- Marked Australia's independence

Independence in 1986?

The Australia Act 1986 (Cth): gave voice to the completion of Australia's evolutionary independence. It was a formal declaration that the Commonwealth of Australia and the Australian states were completely constitutionally independent of the United Kingdom. Callinan J, Shaw (2003) at 86

- Australia Act 1986
- Identical legislation in London – passed in states as well
- Symbolic significance – Queen flies to Aus to sign it – Queen of Australia not G.B

Did the Aus act ensure that we were an independent nation?

- Late 80's and 90's High court is the highest court in Australia.
- 1999 – no concern regarding UK abolishing Aus Acts – HC – Commonwealth one is the one that matters
- Executive – ministers, monarch etc
- Judiciary – may appeal from HC to P.C but that is never going to happen

2. WASHINGTON SYSTEM: FEDERALISM AND REPRESENTATIVE RESPONSIBLE GOVERNMENT

Federalism

- When Australia became a nation on 1 January 1901 it also became a federation.
- Preamble of the Commonwealth of Australia Constitution Act 1900 (Imp).
- Butterworths: A political system in which governmental power is shared between a central or federal government having power over the whole country, and regional governments having power over their respective regions.
- Federalism involves two tiers of government in which power is divided between the Commonwealth and the States.
- Both get their powers directly from the Constitution
- Limits on governments actions/law making

Advantages of a Federation - Alexis de Tocqueville, *Democracy in America* (vol 1), 1835

- Unites the various advantages that result from the large and small size of nations
- Small societies are not preoccupied with the need to defend or expand
- Can focus on internal improvements
- The large nation is glorious and strong

The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite "in one indissoluble Federal Commonwealth", melding their history, embracing their cultures, synthesizing their aspirations and their destinies.-Justice Brennan *Davis v Commonwealth* (1988) 79 at 110

- Govern at the most appropriate level.
- Enhance liberty and prevent tyranny by dividing power
- Checks and Balances – power concentrated in more hands
- Enhances democratic participation through 'dual citizenship'
- 'Laboratories of democracy'? 'Exit'?

A.V. Dicey's views (we should take these with a grain of salt) Not much value

- Weak government
- Tends to rely on a rigid (hard to change) constitution
- Linked to a conservative approach to the constitution
- Predominance of the judiciary in the constitution

Some features of Australian federalism

- State Constitutions, powers, laws, all continue (ss106-108)
- Common market and fiscal union (Ch IV).
- Creation of Commonwealth institutions to safeguard federalism

- High Court (Ch III), the Senate (s7), Inter-State Commission (s101)
- Federal arrangements constitutionally entrenched (s 128).
- Chapter 4 – removal of taxes/tariffs across Australia

Federal features of Constitution

1. Federal Government and State Governments each with its own governmental institutions. Separation of powers: Each has its own institutions of government: legislative (makes laws), executive (administers them) and judiciary (interprets them).
2. Division of power: Whatever concerns the whole nation should be placed under the control of the federal government under express powers (exclusive powers) and other undefined matters should remain in the hands of the states (residual powers)
3. A judicial authority appointed by the Federal Government to determine whether either level of government had exceeded its legislative, executive or judicial powers (High Court)
4. Supremacy of federal laws over state laws in cases of inconsistency s.109
5. Constitution is the supreme law of the land and cannot be changed by normal process of legislation (rigid) Constitution is founded on the assent and ratification of the people.

Federalism & the States

- Cmth parliament can ONLY pass laws on these topics (s.52)
- Limited Commonwealth legislative power – legislation must be consistent with the Constitution and linked to a head of power
- Residual State plenary legislative power – can legislate on any topic they like
- State Constitutions, CLVA, Australia Act ss 2 and 3
- The State Constitutions are ordinary enactments of a legislature
- State Constitutions are very easy to change, simply by amending an Act of Parliament
- Except for 'manner & form' requirements.
- s.51 states can pass laws on these topics too but Federal parliament can only pass laws on these topics (overlap)

Came from AUSTRALIA ACT 1986 - SECT 2 Legislative powers of Parliaments of States

(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

- Law making powers are more general
- Bicameral Parliament – upper house Legislative Council and Lower House – Legislative Assembly – Crown is the Queen.
- No referendum required for Constitutional change – amend in legislation

Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) trade and commerce with other countries, and among the States; ... (vi) the naval and military defence of the Commonwealth and of the several States; ... (vii) lighthouses, lightships, beacons and buoys ... (xx) foreign corporations, and trading or financial corporations formed within the limits of

the Commonwealth; ... (xxxi) the acquisition of property on just terms from any State or person....

There are very few exclusive Commonwealth legislative powers:

Section 52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; (ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth; (iii) other matters declared by this Constitution to be within the exclusive power of the Parliament.

Clash between Commonwealth and State legislation?

- S.109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Commonwealth legislation will be invalid if:

- There is no head of power (eg, under s51 under which the Commonwealth can legislate)
- The legislation is contrary to an express or implied constitutional limitation (eg, s 116 or implied right to vote).

State law will be invalid if:

- It deals with an exclusively-Commonwealth topic (eg, s52)
- The law is inconsistent with a valid Commonwealth law (s.109)
- The law infringes an express or implied constitutional limitation in the Commonwealth Constitution (eg s 92).
- The state law infringes an entrenched limitation in the State constitution (e.g Constitution Act 1902 (NSW) s.7A).
- The state law breaches a 'common law' limitation on parliamentary sovereignty

Territories

- The Territories are different to the States - s.109 no reference to territories
- Don't have the same degree of freedom and autonomy as states do
- N.T – administrator
- A.CT – no regal officer

Australian Capital Territory (Self-Government) Act 1988 (Cth)

- Like a Constitution
- Section 22. Power of Assembly to make laws
- (1) Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.
- (2) The power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive.
- Commonwealth retains the capacity to override territory enactments (may make laws for the government of any territory)
- Convention – Commonwealth should refrain from interfering too much with the territories
- But Euthanasia Laws Act 1997 (Cth) overturned legislation
- Cannot permit Euthanasia – excluded from making laws
- Australian Capital Territory (Self-Government) Act 1988 (Cth) Section 23
- Northern Territory (Self Government) Act 1978, s 50A

An ACT law will be invalid if the ACT law is inconsistent with the Commonwealth Constitution or a Commonwealth law including the Self Govt Act and any Commonwealth laws which target ACT powers or laws retrospectively

Until 2011, the Governor-General could also disallow any ACT enactments under old s 35 of the Self Govt Act.- Gay Marriage Laws ACT

7 territories are governed only by Commonwealth law

- E.g Christmas Island, Australian Antarctic Territory and Jervis Bay Territory
- Unlike the states, whose powers are defined through the Constitution, the powers of these territories are defined in Australian Government law which grants them the right of self-government.
- Australian Government can alter or revoke these powers at will.

Federalism & the Territories

Section 111 The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

Section 122.

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or

otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

- Territory can be acquired by the Commonwealth (s122)

Section 125

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in [NSW], and be distant not less than one hundred miles from Sydney.

Section 52.

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth,....;

Territorial Senators cases

- HCA considered the validity of legislation governing representation of the Territories in the Commonwealth Parliament.
- challenged the validity of the Senate (Representation of the Territories) Act 1973.
- The Act, which provided for the election of two Senators from the ACT and from the NT, was invalid

1st one was *Western Australia v Commonwealth* (1975)

- Section 7: The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.... What do we know about the Territories?
- Section 122: The Parliament may make laws for the government of any territory... and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
- Clashes between federalism and representative democracy
- Majority held that section 7 of the Constitution does not restrict the wider power afforded to Parliament by section 122 to provide for the representation of the Territories "to the extent and on the terms which it thinks fit", and that the Parliament is within its authority to grant the Territories Senate representation.

Selected majority arguments - Murphy J, Mason J, Jacobs J and McTiernan J

Read Constitution as a whole and look to democracy as the key

- Section 122 is very wide and should be construed as applicable to changing conditions
- Read s 7 in light of s122
- Plain terms of s 122 shouldn't be read down
- Non-voting delegate insufficient for 'representation'
- No need to be wary of Senate stacking
- People of the territories have a right to have their voices heard and represented in the Senate
- Allow for full voting and representation in the senate for territories notwithstanding s.122

Selected minority arguments - Barwick CJ, Stephen J and Gibbs J

Read Constitution as a whole

- Federalism the key – even if Senate's role has evolved
- Read s122 against Federalism background.
- Section 7 shouldn't be read down
- A non-voting delegate may meet s122's 'representation'
- Be aware of Senate-stacking
- read s 7 in light of s.122
- States should be protected
- If Commonwealth gives extra number of senators to the territories it will be unfair for the states

Barwick – challenge decision again?

In a judgment delivered less than 15 months after *WA v Commonwealth*, and after a change to the composition of the High Court, Barwick CJ drops a hint... "Before indicating my opinion as to the correct answers to those questions, it should be noted that two States during the argument of these proceedings

questioned the propriety of the Court's decision in *Western Australian v the Commonwealth*. However, unfortunately as I think, neither State proffered any argument in support of this questioning. I saw unfortunately because, if the decision is to be reconsidered, that reconsideration should taken place before what, with due respect to the opinin of others, appears to me to be serious deperature from the federal nature of the Constiution, becomes entrenched in constitutional practice by the mere passage of time.

Queensland knows a hint when it sees one

- *WA v Cth* ('1st Territory Senators Case') Justice Aickin replaces Justice McTiernan in Sept 1976.
- Argued 1975; Judgment Oct 1975.
- *AG (NSW) v Cth ex r McKellar* Argued from Nov 1976; Judgment Feb 1977.
- Hint dropped by Barwick CJ.
- *Qld v Cth* ('2nd Territory Senators Case') Argued May 1977; Judgment Nov 1977.

Queensland v Commonwealth

Majority: Murphy J, Mason J and Jacobs J

Majority*: Gibbs J and Stephen J

Minority: Barwick CJ and Aickin J

The decision in *WA v Cth* was recently given, and by a narrow majority. It has not been followed in any other case. It involves a question of grave constitutional importance. But when it is asked what has occurred to justify the reconsideration of a judgment given not two years ago, the only possible answer is that one member of the Court has retired...

But then a warning from Gibbs J: I consider that if the Parliament were further to distort the federal balance by legislating to provide for the election of more senators for the Territories, that would be a circumstance that might be regarded as sufficient to justify a reconsideration of the question whether *WA v Cth* should continue to be followed.

Representative government

"The Australian Constitution can be viewed as reflecting a struggle, which is still ongoing, between British and United States elements captured in its text"-- Justice Michael Kirby, 1997 Deakin Law School Public Oration Representative government

Representative Government

- Citizens elect members of parliament to represent them (in particular their attitudes, beliefs and perspectives) and thus make decisions in the legislative and executive arms of government
- They are accountable to the people
- Representative democracy rather than direct democracy.
- Some element of direct democracy in the way we amend Constitutions.
- S.7 the Senate – House or review (upper house)– 12 senators from each state and 2 from each territory
- S.24 the House of Representatives (lower house)– elected to represent particular electorates (geographic distribution)– number of members must be approx twice the number of senators
- S.122 Government of territories
- S.128 Altering the Constitution – Passed by absolute majority of both Houses of Parliament. Put to the voters in the form of a referendum and passes by majority of voters and states. Receive royal assent

Representative democracy might mean the Representative:

- Is the agent/delegate of the people she represents, must only act in accordance with the mandate the representative has from the people.
- Is elected by the people, but thereafter is a free agent, and owes her constituents her unbiassed and mature judgment
- The reality probably sits somewhere between the two extremes

Representative government: 9 legislatures

- Commonwealth, 6 States, 2 Territories.
- States' parliaments share a lot -0 Legislative functions, representative gov, regular sittings, responsible government, vice-regal functions

- But there are differences - All States but Qld are bicameral
- Different roles/powers for each house, for referenda, for Governor
- Different term durations, electoral systems
- Territories - Unicameral, share similarities with States, but different constitutional position

The Senate: Ch I, Part II of the Constitution:

Section 7: The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate....

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators. The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

- 36 Senators at Federation (6 x 6).
- Now 76 ((6 x 12) + (2 x 2))
- 6 year fixed terms for State Senators (2 classes)
- Equal representation of Original States and never less than 6 senators for the Originals.

The House: Ch I, Part II of the Constitution:

Section 24: The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators. The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner: ...But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

- Directly chosen by the people of the Commonwealth
- Nexus between House and Senate.
- At Federation, 75 members in total - today there are 150.
- Minimum 5 MHRs in each Original State
- Elections every 3 years (approx - s28)
- Directly proportionate to the population in the state
- HOR (one vote) Elected in different way to the Senate (number)

Case law on Representative government – Chosen by the people

Constitution intended it to mean more than "the right to mark a ballot paper with a number, a cross or a tick, as the case may be." McHugh J, ACTV v Cth at 230

Directly choice by the people is effected only by taking account of the choices expressed by "the people". If some of the choices expressed by the people are not taken into account in the determinative scrutiny, there is at least the possibility that the result determined does not give effect to the choice which the people sought to make. Hayne J in AEC v Johnston [2014] HCA at 80 - if there is no freedom of political communication politicians cannot be said to be directly chosen by the people.

- Except where there is a requirement that particular changes be executed in a particular way ('manner and form').
- At the territory level, constitutional change can be made by the Commonwealth Parliament via ordinary mechanisms of legislation

Formal Amendment of the Constitution

- At the Commonwealth level s128 of the Constitution - 'This Constitution shall not be altered except in the following manner'
- This an entrenchment provision – entrenched to make it hard to change
- It can only be initiated by the Federal parliament
- Further restrictions on any amendment to affect parliamentary representation, territorial limits/constitutional structure of any State.
- Essentially, turns the process into a triple majority requirement: the affected State's voters must also vote in favour.

Constitution can only be altered when it is:

1. Passed by an absolute majority of both Houses of the federal Parliament, or by one House twice and

2. Passed at a referendum by a majority of the people as a whole and by a majority of the people in a majority of states (4 states)

- Proposal then presented to the Governor General for assent
- Regulated by Referendum (Machinery Provisions) Act 1984 (Cth). S.45 every voted must vote – penalty for failing to do so.

Constitutional change

- 1967 – Cth power over Aboriginals and to delete racist references in Constitution
- Last successful attempt - 1977 – maximum age of judges at the HC and federal courts to be 70
- Changes supported by both the PM and Opposition leader are more likely to be successful
- 18% success rate in last 100 years
- Double majority has made it hard to change - 44 proposals only 8 have been successful since 1901

Unsuccessful attempts include:

- To ban the Communist Party (1951)
- To switch to 4-year terms for House of Reps (1988)
- To guarantee basic civil rights and freedoms (1988)
- The last amendment attempt Constitution Alteration (Establishment of Republic) 1999

Constitutional change

- Constitutional change can happen through judicial interpretation and reinterpretation of texts
- Modification of conventions, principles, and doctrines
- Influenced by historical and social factors - Is the UK a foreign power? Sue v Hill
- Constitution has some flexibility
- States can refer matters to the Commonwealth under s51(xxxvii) on which the Commonwealth may then legislate.
- s.31 (7) states can give some power to Commonwealth to legislate e.g terrorism
- Re Wakim – cross vesting – federal and state courts to swap cases with ones another
- 'Cooperative federalism' - Changes can also come from agreements made between those governments.
- But Constitution imposes limits which limit how far experiments in constitutional practice can go without amendment: Re Wakim (1999)
- At the state level, constitutional change can happen by the ordinary mechanisms of state legislation

Responsible government

- Executive is chosen by the legislature, accountable to the legislature, and owes its continued existence/power to the legislature.
- Ministers (Executive) are 'responsible' to parliament for the activities of government and must resign if it loses the confidence of the lower house.
- Executive is not directly elected by the people. The PM/Premier and all ministers must be members of Parliament.
- Establishes a line of accountability from the people (who elect members of parliament) to the executive (which holds office as long as it retains confidence of the parliament)

Confidence of People and House

"Responsible government involves the conception of a legislative chamber where the Ministers of State are answerable ultimately to the electorate for their policies. As Sir Samuel Griffith pointed out ...the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". - McHugh J, ACTV v Commonwealth (1992)

That accountability came to be expressed in terms of the need for the Executive to enjoy the confidence of the House of Parliament dealing with finance, as the arm of government most immediately representing, and therefore responsible to, the people (that is, the electors). It was also expressed in the notion that Ministers are liable to the scrutiny of the chamber of which they are members, both for their conduct and for that of their departments. - Crennan J, Williams v Commonwealth (2012)

Constitutional convention of Ministerial Responsibility

- By constitutional convention, Ministers are responsible/accountable to parliament
- Collective ministerial responsibility – responsible/accountable for Cabinet decisions and policies
- Individual ministerial responsibility – responsible for policies in their department and personal instructions on their part and public servants in their department
- Liable to scrutiny – respond to questions about how they are doing their job
- Parliament has important functions to question and criticise government on behalf of the people
- Standing committees/select committees help scrutinize the executive
- Statutory authorities and utilities must report to the legislature
- Minister liable to scrutiny of chamber, answerable to policy questions, face political consequences, resign/be dismissed etc etc

Constitution and responsible government

- Very little
- No reference to the Prime Minister, or to Cabinet.
- No express provision outlining the HOR formal role in choosing the Executive or expressing confidence in ministers
- No express limit on the Governor-General's powers, or full description of the composition of the Executive

But

- S.53 - requires that 'laws appropriating revenue or moneys, or imposing taxation' must originate in the House of Reps and Section 56 effectively requires that law appropriating revenue or moneys must be government proposals – spending money/imposing tax – e.g Budget
- However, the Senate may still request omissions from or amendments to any such bill (in which case the HOR deals with the request as it sees fit), or block its passage entirely.
- S.56 – Recommendation of money votes
- S.61 – Executive power vested in the Queen
- S.62 – Federal Executive Council to advise Governor General (Ministers must be members of the Council, and that Ministers must be a Senator or Representative)
- S.64 – Ministers of state are appointed by the Governor General
- S.49 - Free debate, etc, in Parliament facilitates accountability

Responsible government

- The Queen/Governor-General/Governor exercises power on the basis of ministerial advice.
- That advice is provided by the person who commands the confidence of the House of Representatives/lower house
- That is, the Prime Minister/Premier and other ministers
- Membership of the Executive is determined by who commands the confidence of HOR - have the most members of HOR e.g opposition
- Difficult – hung parliament – 2010 – no one party controls majority of seats in lower house – coalition of parties

Washminster

- The potential for a clash 'either responsible government will kill federation, or federation... will kill responsible government' John Winthrop Hackett, 12 March 1891
- What happens if the Executive does not command the confidence of the elected Senate and cannot pass bills to spend money as a result?
- What happens if executive introduces a bill and then the Senate rejects?

The potential for a clash 'if we adopt this Cabinet system of Executive it will either kill

Federation or Federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber. 'Sir Richard Baker, 23 March 1897-

The Dismissal, 11 November 1975.

Whitlam dismissed by Governor General 1975 – election forced

- Responsible government central to Williams(2012)
- Representative government central to Roach(2007) and Rowe(2010)

- The clash between responsible government and federalism central to understanding the Dismissal (1975)

3. KEY CONSTITUTIONAL THEMES AND CONSTITUTIONAL CONVENTIONS

Why do these ideas matter?

- Unwritten or uncodified principles, ideologies, constitutional conventions, and doctrines.

Liberalism

- Liberty primacy as a political value
- Restrictions on liberty need to be justified by the government
- Equality
- Rule of law, popular sovereignty
- A fight over individuals' civil and political rights (ACTV, Nationwide News, Roach).
- A fight over free trade (Bank Nationalisation Case; Cole v Whitfield)

Rule of Law

The restriction of the arbitrary exercise of power by the government via well-defined and established laws.

A.V. Dicey's - father of British Constitutional law - The rule of law

- Only punish people if they have done something against the law (Suffering in goods e.g fine)
- No matter who you are you are subject to the same law as everyone else (everyone is treated equally)
- Courts can uphold basic human rights (don't need Bill of Rights or rights enshrined in the Constitution)

The rule of law Fuller (1964) /Raz (2002)

The law should be:

1. Prospective – govern the future and not criminalise things that have happened in the past
2. Open – no secret laws
3. Clear – greater clarity in the law
4. Relatively stable – not change everyday

Further for Raz (Authority of the Law 2002) the rule of law requires

- Rules governing the making of rules – Constitution
- Independent judiciary
- Natural justice
- Courts review powers
- Accessibility of courts
- Police and prosecutors should not be allowed to pervert the law.

Fuller and Raz's conception of the rule of law does not discuss equality in the law

The rule of law

- Would laws passed by a dictator be capable of meeting the criteria set out by Fuller and Raz? Yes
- Definitions like this are formal, procedural and thin
- Substantive, thick accounts – more expansive definition – includes protection of rights

Quotes

"A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed.... The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental." - Lord Bingham (2007)

"The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny" - Baroness Hale, Jackson v Attorney General (2005) at [159].

"In Australian Communist Party v Commonwealth (1951), Dixon J said that the Constitution: "is an instrument framed in accordance with many traditional